135-304

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 556. 274

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS, PLAINTIFF IN ERROR,

vs.

SAM. H. MILLIKEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED DECEMBER 11, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 9, 1888.

1 Pleas before the judges of the circuit court of the United States for the fifth circuit and northern district of Texas, at Dallas, at the district court room, at the January term, in the year of our Lord one thousand eight hundred and eighty-six, in the case wherein Societe Fonciere et Agricole des Etats Unis is plaintiff and Sam. H. Milliken is defendant.

Be it remembered that on the 6th day of June, in the year of our Lord one thousand eight hundred and eighty-five, the said plaintiff, by Harcourt & Ball, its attorneys, came into the court aforesaid, before the judges thereof, and filed its declaration or petition against the said defendant; which said petition is in the words and figures following, to wit:

Plaintiff's Petition.

In the United States Circuit Court, Fifth Circuit and Northern District of Texas, at Dallas.

To the Hon. A. P. McCormick, judge of said court:

The petition of the "Societe Fonciere et Agricole des Etats Unis," a foreign corporation duly incorporated and organized by the name aforesaid under the laws of the Republic of France, and has its principal place of business in the city of Paris, in the said Republic of France, and is a citizen of said Republic of France, and in liquidation, and brings this suit in its own corporate name and is joined herein by Edmond Moreau, the liquidator, who was duly appointed on the — day of November, 1882, by the French court, in Paris, having jurisdiction of the same, to be the liquidator of said company, with full power and authority to take and hold possession of all the property and effects of said corporation and to manage and
2 control the same, and to institute and maintain any and all suits at law or in equity necessary and proper to assist, protect, and maintain the rights of property and of action of the said corporation, and he joins in this suit in his said representative capacity for all legal purposes, and by the authority of the said court prosecutes this suit and represents that he and the said corporation are citizens of the said Republic of France; and, complaining of the defendant, Sam. H. Milliken, who is a resident citizen of the county of Parker, in the State of Texas, respectfully represents that on the 9th day of January, 1883, the said defendant, Sam. H. Milliken, filed a suit in the United States circuit court for the northern district of Texas, at Dallas, against the said plaintiff, "Societe Fonciere et Agricole des Etats Unis," alleging, among other things, that the said defendant is a foreign corporation and is the owner in fee of large bodies and tracts of land in the counties of Parker and Palo Pinto, in the State of Texas. The said defendant has an office and place of business and a general agent acting for it in the city of Weatherford, in Parker county, Texas; that Henry P. du Bellet is the duly authorized general agent of the defendant at said place.

It was alleged that the said corporation was organized under the law- of the Republic of France and has its principal place of business in the said Republic of France and is a citizen of said Republic. It was then alleged that on the 21 day of July, 1882, the said corporation, by its general agent, Henry P. du Bellet, made, executed, and delivered to the said Millican its promissory note in sub-
3 stance as follows:

$15,800. WEATHERFORD, TEXAS, *July 21st*, 1882.

Without grace, ninety days after date we or either of us promise to pay to the order of Sam. H. Milliken fifteen thousand eight hundred dollars, at the First National Bank, at Weatherford, for value received, with interest at the rate of twelve per cent. per annum from date and ten per cent. as attorneys' fee if collected by law.

(Signed) SOCIETE FONCIERE ET AGRICOLE
DES ETATS UNIS,
By HENRY P. DU BELLET, *Gen'l Agent.*

It was further alleged that said corporation, by its said agent, made, executed, and delivered to C. H. Milliken, cashier, its promissory note in substance as follows:

$5,000. WEATHERFORD, TEXAS, *July 9th*, 1882.

Without grace, ninety days after date we or either of us promise to pay to the order of C. H. Milliken, cash'r, five thousand dollars, at the First National Bank of Weatherford, for value received, with interest at the rate of twelve per cent. per annum from maturity and ten per cent. as attorneys' fee if collected by law.

(Signed) SOCIETE FONCIERE ET AGRICOLE
DES ETATS UNIS,
By HENRY P. DU BELLET, *Gen'l Agent.*

It was further alleged that said corporation, by its said agent, made, executed, and delivered to Sam. H. Milliken its promissory note in substance as follows, viz:

$3,000. WEATHERFORD, TEXAS, *Dec.* 27, 1882.

Without grace, forty days after date we or either of us promise to pay to the order of Sam. H. Milliken three thousand dollars, at the First National Bank of Weatherford, for value received, with interest at the rate of twelve per cent. per annum and ten per cent. as
4 attorneys' fee if collected by law.

(Signed) SOCIETE FONCIERE ET AGRICOLE
DES ETATS UNIS,
By HENRY P. DU BELLET, *Gen'l Agent.*

It was alleged that all of said notes were owing and unpaid and all overdue except the last-mentioned note, which it was alleged would be due on the 5th day of February, 1883. There was a prayer for citation to the defendant and for a writ of attachment and for

judgment for $23,800, the amount of said notes, with interest and attorneys' fees, and for foreclosure of attachment and general relief; all of which will more fully appear by reference to the original papers filed in said court in No. 374 on the docket of said court.

Your petitioners further represent that on the 19th day of May, 1883, the said defendant, Sam. H. Milliken, filed another suit in the United States circuit court for the northern district of Texas, at Dallas, against the said plaintiff, "Societe Fonciere et Agricole des Etats Unis," alleging, among other things, that the said "Societe Fonciere et Agricole des Etats Unis" is an alien and a citizen of the Republic of France, incorporated by said name under the laws of said Republic of France, and has its principal place of business in the said Republic of France; that it is a foreign private corporation, but has an office and a general agent for the transaction of its business in the city of Weatherford, in Parker county, Texas; that Henry P. du Bellet is the general agent of the defendant at said city of Weatherford, Parker county, Texas.

It was alleged that the said corporation, by its general agent, Henry P. du Bellet, did, on the 16th day of May, 1883,
5 make, execute, and deliver to the plaintiff, Sam. H. Milliken, its note in substance as follows, viz:

$2,819.99. WEATHERFORD, TEXAS, *May* 16, 1883.

Without grace, one day after date we or either of us promise to pay to the order of Sam. H. Milliken two thousand eight hundred and nineteen $\frac{99}{100}$ dollars, at the First National Bank of Weatherford, for value received, with interest at the rate of twelve per cent. per annum from maturity and ten per cent. as attorneys' fee if collected by law.

(Signed) SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS,
By HENRY P. DU BELLET, *Gen'l Agent.*

It was alleged that said note was overdue and unpaid. There was a prayer for citation to the defendant and for judgment for the amount due on said note and for the ten per cent. for attorneys' fees and for general relief, all of which will more fully appear by reference to the original papers on file in said court in No. 431 on the docket of said court.

Petitioners further represent that while it appears from the pleadings in the two suits cited and referred to as aforesaid that the said corporation, "Societe Fonciere et Agricole des Etats Unis," was an alien and a foreign corporation and a non-resident of the State of Texas, yet the plaintiff in said suits, Sam. H. Milliken, illegally and wrongfully pretended and represented that the said corporation was a resident citizen of the county of Parker, in said State, and induced the clerk of said court to issue a citation for personal service, and directed the same to be served on Henry P. du
6 Bellet, of Parker county, Texas, and there was a pretended service of said citations in each of said cases by the United States marshal of said district on the said Henry P. du Bellet, as

will appear by the said officer's return, and there was no personal service or service by publication, or any other service known to the law, made upon the said corporation, Societe Fonciere et Agricole des Etats Unis.

Petitioners further represent that at the date of the filing of the first suit as aforesaid by the said Sam. H. Milliken, on the said 9th day of January, 1883, the said Milliken sued out a writ of attachment based upon the ground and allegation that the defendant in said cause was not a resident of the State of Texas or is a foreign corporation or is acting as such, and by virtue of said attachment the United States marshal proceeded to levy upon a great number of different tracts of land situated in the counties of Parker and Palo Pinto, which will be hereinafter more particularly set forth and described; that notwithstanding there was no legal or valid service of the citation in the said two suits above mentioned and described, yet the said Sam. H. Milliken pretended and represented to said court that service was perfected and the defendant in said suits had been legally cited, and thereupon the said court was misled and deceived, and proceeded on the 8th day of June, 1883, to render judgment in said cause No. 374 for the sum of $28,627.50, with twelve per cent. interest on $26,025 and all costs, and in said cause
7 No. 431 for the sum of ——, with twelve per cent. interest and all costs, and also a decree foreclosing the attachment lien on the said tracts of land; that said judgments were rendered by default and there was no service of process or acceptance or waiver of process or appearance by the defendant in said suits; that the said foreign corporation was not an incorporated company known to the laws of Texas and within the meaning of art. 1223, Rev. Statutes of Texas, so as to authorize service of citation upon a local agent, and the said suits were not brought in Parker county, as contemplated by said statute, nor was the service made on said agent in Dallas county, where the said suits were brought.

Petitioners now represent to this honorable court that the said corporation, "Societe Fonciere et Agricole des Etats Unis," was duly incorporated in Paris, France, by authority of the law of the French Empire of 24 July, 1867, regulating anonymous societies for the following objects and purposes, viz:

"This society has for its object all real estate, agricultural, and commercial operations of every nature whatsoever regarding the purchase, the acquisition in the way of grants or otherwise, and the improvement as owner or otherwise of lands in the State of Texas, America; the execution of public or private improvements and improvements of every kind on the lands worked by the society; the sale or transfer of all products, lands, and other real or personal property belonging to the society. The society may also consolidate with other companies and establishments of same or different nature
situated in France or in America, acquire all rights and
8 obligations of these companies, or take an interest therein."

That said corporation was duly organized on the 1st day of October, 1880, and had its domicil and principal office in Paris, France; that under and by virtue of art. 11, Code Napoleon, of the 14

July, 1819, which was a general public statutory law and which has been ever since and still is in full force and effect, all the rights of natural-born subjects and citizens of the Republic of France, both in and to the acquisition, holding, and disposition of real and personal property of every description situated within said Republic, are expressly given to and conferred upon foreigners and aliens, and by virtue of said law and the treatise between the two Governments citizens of the United States are entitled to the same civil rights in France which are granted to Frenchmen. Petitioners represent that the said corporation, accepting the overtures of the State of Texas in inviting foreign capital and immigration, invested in the State of Texas $50,000 in the purchase of 50,000 acres of wild, unimproved lands in the said counties of Parker and Palo Pinto, and commenced improvements on a large portion of the same and settled a large number of immigrants on the same; that said corporation had no principal office or place of business in the said State of Texas, but it had an agent, Henry P. du Bellet, in Weatherford, Parker county, with certain limited and restricted powers for making contracts, but he had no power or authority to waive or accept service of process and was not designated as an agent upon
9 whom service could be made.

Petitioners represent that at the time of the execution and delivery of the said promissory notes to the said Milliken by the said agent, Henry P. du Bellet, he also made, executed, and delivered, as a cotemporaneous instrument, two deeds of trust, to secure the payment of the above-described promissory notes of $5,000 and $15,800, by the conveyance of 17,470 acres of land in Parker and Palo Pinto counties and also valuable town and city lots in the city of Weatherford and in the town of Mineral Wells, in Palo Pinto county, and which was ample security for all of said debts and embraced the lands and lots attached by the U. S. marshal, as shown by his inventory filed in said court on the 20 day of January, 1883, valued by him at $27,395.53. The said defendant herein is notified to produce the original of said trust deeds on the trial hereof, or else secondary evidence will be offered of the same.

Petitioners further represent that at the time of filing the said suit on said notes the defendant, Sam. H. Milliken, filed with his petition an affidavit in writing that plaintiff is not a resident of the State of Texas or is a foreign corporation or is acting as such, and thereupon obtained the said writ of attachment, which was levied as aforesaid on the said lands and town lots; that in the said pretended judgment there was no proper decree or judgment; that said attachment lien as it existed on the said 10th day of January, 1883, be, and the same is hereby, foreclosed, and that an order of
10 sale be issued, &c., but it was recited in said judgment that the attachment lien be foreclosed "by a sale of the said lands," and the clerk was directed to issue an order of sale, &c.; that an order of sale was issued in said cause on the 29th day of June, 1883, and by virtue of said order the United States marshal proceeded to sell, in the town of Palo Pinto, State of Texas, on the 7th day of August, 1883, a large amount of the property of said company,

when the said Sam. H. Milliken became the purchaser of the following tracts and parcels of land, at the following prices, within the reservation of the Memphis and El Paso & Pacific Railway Company, in Palo Pinto county, viz:

Block	11,	sec. 25,	480, acres, at	$200 00
"	1,	sec. 27,	428 "	400 00
"	"	" 23,	548.91 acres, at	300 00
"	2,	" 7,	640 "	300 00
"	2,	" 11,	640 "	400 00
"	2,	" 15,	640 "	300 00
"	2,	" 17,	640 "	300 00
"	2,	" 19,	640 "	640 00
"	2,	" 21,	640 "	300 00
"	2,	" 29,	640 "	300 00
"	2,	" 31,	640 "	400 00
"	A,	" 11,	550.61 "	300 00
"	1,	" 29,	580.68 "	300 00
"	2,	" 9,	603.50 "	603 50
"	1,	" 35,	640 "	300 00
"	1,	" 37,	441.11 "	300 00
"	2,	" 1,	503.66 "	300 00
"	1,	" 7,	539.81 "	300 00
"	2,	" 23,	640 "	400 00
"	2,	" 25,	640 "	640 00
	Block	2, sec. 27,	640 acres, at	400 00
11	Block	2, sec. 33,	640 acres, at	750 00
	"	2, " 35,	640 " "	640 00
Block	2,	sec. 37,	640 acres, at	640 00
715	town lots	in Ednaville		2,103 25
3	"	" "	"	10 20

And the following tracts to other purchasers:

Block	A,	sec. 65,	W. K. Bell, 625.90 acres, at	175 00
"	"	" 5,	H. C. McClure, 421.80 acres, at	21 00
"	"	" 7,	F. J. White, 640 " "	45 00
"	"	" 13,	G. W. McDonald, 520 " "	45 00
"	A,	" 19,	G. D. Oakes, 281.21 " "	31 00
"	"	" 27,	W. J. Hale, 293.47 " "	20 00
"	"	" 15,	F. J. White, 640 " "	40 00
"	"	" 17,	F. J. White, 640 " "	61 00
"	1	" 9,	J. H. Baker, 431.21 " "	40 00
"	1	" 19,	J. L. Cunningham, 562.41 acres, at	50 00
"	1	" 21,	F. J. White, 320 acres, at	32 00
				$12,386 95

And afterwards, on the 4 Sept., 1883, the said marshal sold in the town of Weatherford, Parker county, the following property, which was purchased by Sam. H. Milliken:

Section	73, 456.56 acres, at	375 00
"	87, 612.60 "	625 00
"	89, 437.79 "	555 00
"	93, 322.77 "	440 00
"	169, 249.22 "	380 00
"	173, 640 "	705 00
"	185, 382.27 "	155 00
"	207, 640 "	1,205 00
"	217, 419.60 "	670 00
"	227, 398.06 "	705 00
	Section 235, 620 acres, at	1,180 00
12	Section 245, 640 acres, at	1,150 00
	" 247, 560 "	755 00
Section	249, 640 acres, at	905 00
"	263, 622.23 acres, at	830 00
"	275, 640 acres, at	1,205 00
"	277, 640 "	1,130 00
"	279, 640 "	1,205 00
"	299, 264.22 "	405 00
"	311, 640 "	1,255 00
"	313, 640 "	1,130 00
"	315, 515 "	705 00
"	251, 149.2 "	100 00
	Sales aggregating	17,970 00
	Also bl'k A, sec. 17, 632.30	325 00
	Adding sales in Palo Pinto Co.	12,386 95
		$30,681 95

And afterwards, on the 1st day of April, 1884, the *the* said United States marshal sold, under said order of sale, in the city of Weatherford, Parker county, Texas, to the said Sam. H. Milliken the following-described city lots in Weatherford at the following prices:

4 lots in block No. 1, lots 1, 2, 3, & 4, at $5 ea.		$20 00
16 " " " 2, " 1 to 16, at $5 ea.		80 00
16 " " " 3, " 1 " 16, "		80 00
2 " " " 4, " 7, 8, "		10 00
7 " " " 5, " 1 to 7, "		35 00
1 " " " 6, " 9, at $9 ea.		9 00
7 " " " 6, " 2 to 8, at $5		35 00

And under *alias* execution—

4 lots, block 7, lots 1 to 4, at $5	20 00
4 " " 8, " 10 to 13, at $5	20 00
8 " " 9, " 9 " 16, "	40 00
7 " " 10, " 10 " 16, "	35 00
10 lots, block 11, 1 to 10, at $5	50 00

13	14	lots	in	block	12,	lots	3 to 16,	at $5	----------	70 00
	14	"	"		13,	"	3 " 16,	"	----------	70 00
10	lots	in	block	14,	lots	1 to 10,	at $5	----------		50 00
1	"	"		16,	"	2,	"	----------		5 00
3	"	"		19,	"	1, 2, 3,	"	----------		15 00
9	"	"		20,	"	1 to 8, 16,	"	----------		45 00
15	"	"		21,	"	1 " 14, 16,	at $5	----------		75 00
4	"	"		22,	"	1 " 4,	"	----------		20 00
15	"	"		23,	"	1 " 8, 10 to 16,	at $5	----------		75 00
8	"	"		30,	"	9 " 16,	"	"	----------	40 00
8	"	"		31,	"	9 " 16,	"	"	----------	40 00
16	"	"		32,	"	1 " 16,	"	"	----------	80 00
16	"	"		33,	"	1 " 16,	"	"	----------	80 00
12	"	"		34,	"	1 " 4, 9 to 16	"	----------		60 00
4	"	"		35,	"	12 " 16,	"	----------		20 00
										1,179 00
							Add sales of lands		----------	30,681 95
										$31,860 95

Petitioners now charge and allege that for the want of service of process as aforesaid and for other causes set forth the said court was without jurisdiction, and the said judgment rendered as aforesaid was nugatory, null, and void; that the said attachment proceeding was also null and void because the affidavit for attachment alleged in the disjunctive the existence of one or the other of two or three distinct causes for the attachment; that the said order of sale was illegally issued during the session of said court, and the valuable property of said corporation was illegally and wrongfully sold for a grossly inadequate price; that the said Sam. H. Milliken, by his management, prevented fair competition and discouraged and prevented other bidders, so that he could obtain the purchase of all of said property; that he falsely pretended to the agent of said corporation that all he wanted was to get a judgment, and that at any time he would give up said property upon the payment of said notes and interest.

14

Petitioners further allege that said judgment was illegal and void because the said corporation was in the hands of a receiver, known under the laws of France as a liquidator, who was the public agent and trustee of said corporation and could not delegate any authority to the agent in Texas to act and represent the said corporation at the time of the filing of said suit, and the pretended service of said process and at the date of said judgment, and of this the said Sam. H. Milliken had full notice; that the said corporation and the said liquidator did not have legal notice of said suit and had no opportunity of filing their defense; that they have a good defense to said action, in this: That the said Sam. H. Milliken was the president of the First National Bank at Weatherford; took advantage of the embar--assment of said corporation and its agent and exacted and demanded extravagant usurious interest, which was included and embraced in

said promissory notes and on open account, and the usury amounted at the date of said judgment to the sum of $1,179.08; that the amount of money really advanced and loaned to said corporation
15 by said Sam. H. Milliken was the sum of about $23,140.00; that the amount of twelve per cent. interest on said sum was, up to date of said judgment, on the 8 June, 1883, the sum of $2,000.38, and the excess over that amount and the illegal interest on open account of $297.44 is the amount of money which was demanded and paid to the said Milliken by the said corporation; that in addition to said usurious contract the stipulation in said promissory notes for the payment of ten per cent. as attorney's fee, if collected by law, was an artful device to cover illegal interest, and that amount was received and collected by the said Milliken and was not paid to any attorney as a fee for collecting said note; that by reason of said errors, wrongs, and irregularities the said corporation has been damaged in the sum of $80,000, which is the reasonable value of said property at the time it was purchased by the said Sam. H. Milliken; that the said plaintiffs did not ascertain or discover the real facts and the illegality of said proceedings and the nature of the defense to said suits until within the last three months; that the said corporation is ready and willing to pay to said def't, Sam. H. Milliken, the full amount of all that is legally due on said promissory notes and will submit to any judgment or decree that may be rendered herein.

Wherefore your petitioners pray that the defendant may
16 be cited to answer this petition, and that, upon a rehearing and review of said cause, said judgment may be set aside and all the proceedings thereunder vacated, annulled, and cancelled; that said sales may be set aside, and all the deeds and conveyances made by the said marshal to the said Sam. H. Milliken may be decreed void and cancelled, and that the fabulous cost bill rendered by the said marshal be retaxed and corrected, and that such judgment may be reformed and rendered for the principal sum of money due on said notes, excluding the whole rate of interest as prescribed by law in such cases, and that said plaintiffs have such other and further relief as they or either of them may be entitled to.

(Signed) HARCOURT & BALL,
Attorneys for Pl'ff-.

THE STATE OF TEXAS, *County of Parker:*

Before me, Henry Miller, a notary public in and for the said county of Parker, personally appeared Henry P. du Bellet, and, after being duly sworn, stated on oath that he is the agent of the said plaintiff, Societe Fonciere et Agricole des Etats Unis, and of the liquidator, Edmond Moreau, and that the facts stated and set forth in the foregoing petition are true.

(Signed) HENRY P. DU BELLET.

Subscribed and sworn to before me this third day of June, 1885.

Witness my hand and notarial seal, at office, in Weatherford, Parker county, Texas, this 3rd day of June, 1885.

[SEAL.] (Signed) HENRY MILLER,
Notary Public, Parker Co., Tex.

17 (Endorsed:) No. 784. "Societe Fonciere et Agricole des Etats Unis" *et al. vs.* Sam. H. Milliken. Petition for rehearing and to set aside judgment by default. Filed June 6, 1885. A. J. Houston, clerk, by Jas. D. Adams, deputy.

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS *et al.*
vs.
SAM. H. MILLIKEN. } No. 784.

THURSDAY, *January* 28, 1886.

This day, upon application of plaintiffs, they are hereby granted leave to amend in this cause.

18 SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS
vs.
SAM. H. MILLIKEN.

And now comes the said plaintiff, by leave of the court, and, for amendment to its original petition in said cause, asks leave to submit the following as additional jurisdictional causes for the nullity of said default judgment:

1. Because it appears that the citation commanded the United States marshal to summons the said corporation by name and did not authorize a direct service to be made on the said Henry P. du Bellet.

2. Because the return shows that it was served on a person not named in the writ without legal authority.

3. Because the record fails to show that the foreign corporation had established an agency in the State.

4. The attachment was illegal and void because the attachment bond was not "in a sum not less than double the debt sworn to be due." The said bond was in the sum of $48,000, and the debt sworn to be due was $23,800, with interest, as stated in his petition, which, on the date alleged to be due, on the 5th day of February, 1883, was $1,219.20, and the total debt was then $25,019.20, with 10 %, att'y's fee of $2,501.92, making the total debt sworn to be due $27,521.12 on the 5th day of February, 1883.

5. Because there was no valid levy of the attachment or any return thereon by the U. S. marshal with his action endorsed or attached thereto and signed by him officially.

19 6. Because there was no return by the officer describing the property attached with sufficient certainty to identify it or to show that any levy or lien had been placed on the property or any date when it was attached.

Wherefor- plaintiff prays judgment.

(Signed) HARCOURT & BALL,
Att'ys for Pl'ff.

(Endorsed:) No. 784. Societe Fonciere et Agricole des Etats Unis *vs.* Sam. H. Millican. Amendment. Filed Jan'y 28, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

20 *Summons.*

In the United States Circuit Court, Fifth Circuit and Northern District of Texas, at Dallas.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

You are hereby commanded to summon the Societe Fonciere et Agricole des Etats Unis, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next regular term thereof, to be holden for the fifth judicial circuit and northern district of Texas, at the court-room thereof, in the city of Dallas, on the first Monday, it being the fourth day, of June next, to answer the petition in case No. 374, filed on the ninth day of January, 1883, of Samuel H. Milliken, plaintiff, against The Societe Fonciere et Agricole des Etats Unis, defendant. The nature of the plaintiff's demand is as follows, to wit: Suit to recover the sum of $23,800, now due from defendant to plaintiff, except the sum of $3,000.00, which will become due on the 5th day of February, 1883, for which said amount defendant delivered to plaintiff, by its general agent, Henry P. du Bellet, three certain promissory notes. For fuller statement reference is made to certified copy of petition hereto attached, of which you will serve the said The Societe Fonciere et Agricole des Etats Unis also with the accompanying certified copy of said petition and with a true copy of this writ. Her-in fail not, and due return of this writ make on or before the 4th day of June next showing how you have executed the same.

21 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Dallas, Texas, this 9th day of January, in the year of our Lord eighteen hundred and eighty-three, and of American Independence the 107th year.

[SEAL.] (Signed) A. J. HOUSTON,
Clerk of said Circuit Court.

(Endorsed:) No. 374. U. S. circuit court, northern district of Texas, at Dallas. Samuel H. Milliken *vs.* Societe Fonciere et Agricole des Etats Unis. Original citation to Societe Fonciere et Agricole des Etats Unis. Parker county. Issued on the 9th day of January, A. D. 1883. Houston, clerk. Returned and filed on the 11th day of January, A. D. 1883. Houston, clerk.

Marshal's Return.

Received this writ on the 9th day of Jan'y, 1883, and I executed the same on the 10th day of Jan'y, 1883, by delivering to the within-named defendant's gen'l agent, H. P. du Bellett, at Weatherford,

Parker county, Texas, in person, a certified copy of the petition in this case; also a true copy of this writ.

JAMES A. McKEE,
U. S. Marshal, N. D. T.,
By A. J. HALEY, *Deputy.*

Fee	$2 00
Mileage	3 78
Or	$5 78

22 *Affidavit for Attachment.*

United States Circuit Court for the Northern District of Texas, at Dallas, Texas.

SAM'L H. MILLIKEN
vs.
SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS.

Before me, the undersigned authority, this day personally appeared Sam'l H. Milliken, who, having been first sworn, says that he is the pl'f in the above-entitled cause; that the def't, Societe Fonciere et Agricole des Etats Unis, is justly indebted to him in the sum of twenty-three thousand eight hundred dollars, with interest, as stated in his petition; that of this sum twenty thousand & eight hundred dollars is now due, and that the sum of three thousand dollars will be due on the fifth day of Feb'y, 1883; that the defendant, Societe Fonciere et Agricole des Etats Unis, is not a resident of the State of Texas -or is a foreign corporation -or is acting as such; that the attachment is not sued out for the purpose of injuring or harrassing the defendant; that the pl'f will probably lose his debt unless such attachment issues.

(Signed) SAM. H. MILLIKEN.

Sworn to and subscribed before me on this the 8th day of Jan'y, A. D. 1883.

[SEAL.] (Signed) MACK B. ROACH,
Notary Public, Parker Co., Texas.

(Endorsed:) No. 374. S. H. Milliken *vs.* Societe Fonciere et Agricole des Etats Unis. Affidavit for attachment. Filed Jan'y 9, 1883. A. J. Houston, clerk.

23 *Bond for Attachment.*

In the U. S. Circuit Court for the Northern Dist. of Texas, Holden at Dallas, Texas.

SAMUEL H. MILLIKEN
vs.
SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS.

We, the undersigned, Samuel H. Milliken, as principal, and J. W. Hedrick, A. S. Sumnars, & H. E. Swain, as sureties, acknowledge

ourselves bound to pay to "Societe Fonciere et Agricole des Etats Unis" the sum of forty-eight thousand dollars, conditioned that the above-bound Sam'l H. Milliken, pl'f in attachment against the said "Societe Fonciere et Agricole des Etats Unis," defendant, will prosecute his said suit to effect, and that he will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment.

Witness our hands this the 8th day of Jan'y, 1883.

(Signed) SAM. H. MILLICAN.
(Signed) J. W. HEDRICK.
(Signed) H. E. SWAIN.

Approved January 9, 1883.
(Signed) A. J. HOUSTON, *Clerk.*

JAN'Y 6TH, '83.

I would state that the parties whose signatures appear to the above bond are worth fully the amount of $48,000.

(Signed) C. H. MILLIKEN,
Cas. The First National Bank, Weatherford, T'xas.

(Endorsed:) No. 374. S. H. Milliken *vs.* Societe F. & A. des E. S. Attachment bond. Filed Jan'y 9th, 1883. A. J. Houston, clerk.

And afterwards, to wit, on the 8th day of June, 1883, the following judgment was rendered by default:

24 *Judgment by Default.*

SAMUEL H. MILLIKEN
vs.
SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS. } No. 374.

On this the 8th day of June, 1883, came the plaintiff, by his attorney, and the defendant having failed to appear and answer in this behalf, but wholly made default, wherefore the plaintiff, Samuel H. Milliken, sought to have and recover of the defendant, Societe Fonciere et Agricole des Etats Unis, his damages by occasion of the premises, and it appearing to the court that the cause of action is liquidated and proved by instruments in writing—

It is ordered that the clerk of this court do assess the damages sustained by the plaintiff, and, the said clerk now here having assessed the said damages at the sum of twenty-six thousand and twenty-five dollars as principal and interest, and the further sum of two thousand six hundred and two dollars and fifty cents as attorney's fee, it is therefore considered by the court that the said plaintiff do have and recover of the said defendant the said sum of twenty-six thousand and twenty-five dollars, with interest thereon at the rate of twelve per cent. per annum until paid, and also the further sum of twenty-six hundred and two dollars and fifty cents and all costs of this suit. It further appears to the court that a writ of attachment was, on the

9th day of January, 1883, issued in this cause, which said writ was, on the 10th day of January, 1883, by the U. S. marshal for the northern district of Texas, levied upon the following-described lands, the property of the defendant, situated in the counties of Parker
25 and Palo Pinto, Texas, and described as follows, to wit: (Field notes omitted by order of appellant's counsel.)

It further appears to the court that by reason of the levy of the said attachment writ on the said land the plaintiff has a lien thereon.

It is therefore ordered and adjudged that the said lien be foreclosed by a sale of the said land, and that the clerk of this court do issue an order of sale directed to the United States marshal for the northern district of Texas, commanding him, the said marshal, to seize and sell the said land as under execution; that he apply the proceeds thereof, first, to the payment of this judgment and costs of suit, and any excess that there may be he will pay over to the defendant, and execution may issue for any unpaid balance.

Afterwards, to wit, on the 15th day of January, 1886, came the said defendant, Sam. H. Milliken, by B. G. Bidwell, his attorney, and filed his general and special demurrers to plaintiffs' petition as follows, to wit:

26 *Defendant's Plea.*

In the U. S. Circuit Court at Dallas, Texas.

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS *et al.*
vs.
SAM. H. MILLIKEN. } No. 784.

In this case the def't, Sam. H. Milliken, comes into court and demurs generally to the pl'fs' petition herein, and for demur- says that it is known in pl'fs' said petition that the matters & things therein set out and complained of and the relief sought are cognizable alone by a court of equity, and this court or a court of law has no jurisdiction to hear and determine the same nor to grant the relief prayed for. Wherefore def't says this court ought not to entertain said suit to hear and determine the same, upon which he prays the judg't of the court.

(Signed) B. G. BIDWELL,
Att'y for Def't.

Further specially demurring to said petition, the defendant says the same is insufficient, because—

First. The pl'fs are seeking to review a judg't at law, after the adjournment of the term of court at which said judg't was rendered, by a proceeding in said court, which is a court of law and not a court of equity.

Second. Pl'fs' petition shows that it is brought by def. comp'y and one Edmond Moreau, who, it is shown, was not a party to the suit

sought to be reviewed, and is not a party; and, further, that
27 he is a foreign assignee, claiming the property in controversy as against a home attaching creditor.

Third. Pl'fs do not show that they have or had any defense to the claim sued on by def't and in which the judg't complained of was rendered, but admit the justness of said claim, and they do not show why they or the pl'f company did not appear and answer in said suit.

Fourth. They seek to set aside a judg't which they say is null and void, which, if true, cannot and does not in any way effect their rights.

Upon all of which the defendant prays the judg't of the court.

(Signed) B. G. BIDWELL,
Att'y for Def't.

Further answering, subject to the foregoing demurrers, the defendant, Sam. H. Milliken, denies each and every allegation of pl'f's petition and says that the same as averred are untrue.

(Signed) B. G. BIDWELL,
Att'y for Def't.

Further answering, the defendant, Sam. H. Milliken, says that it is not true that he in any way pretended and that the pl'f corporation was a citizen of Parker county, Texas, but in his petition he expressly averred that it was a foreign corporation. It is not true that the service on said corporation was illegal, but it was proper and legal. It was served on said company's agent, H. P. du Bellet, who was the general agent of said company in Tex.; it had no other agent in the State & the service on him was regular and in
28 accordance to law. It is not true that the affidavit for attachment was in the disjunctive, but was in every way in literal compliance with law. It is not true that the order of sale on said judg't was improperly issued. The same was issued as is directed by law. It is not true, but positively false in fact, that def't in any way prevented or tried to prevent competition at the bidding on sale of the land, but it is true that he was not present at the sale of lands in Palo Pinto county, but pl'f's agent, H. P. du Bellet, was present at said sale. At the sale in Parker county there were other bidders who bid on the most of the lands when offered, & def'ts thinks & avers that they bid on all of the land. It is not true that def't ever in any way, by false representations to pl'f-'s agent or otherwise, — that all he wanted was a judgment, and that he would at any time give up said property upon the payment of the notes sued on, and interest. Def't knows nothing of the appointment of a receiver in France to take possession of the property of the said corporation, and says that such is not true. It is not true that pl'f did not know of all the facts connected with said suit and any defense it may have had thereto until within three months of the filing of the petition herein. Def't says that the board of directors of said company did, on the — day of ——, 1883, at a meeting held in Paris, France, ratify, confirm, and adopt the acts of their agent, H. P. du Bellet, in

executing the notes on which def't sued, and also in executing said deed of trust, as set out by pl'fs; which said act of said board
29 was done when said agent was present in Paris, France, and had fully advised them of every fact connected with the affair. Having fully answered, the def't prays to be dismissed with costs.

(Signed) B. G. BIDWELL,
Att'y for Def't.

(Endorsed:) No. 784. Societe Fonciere et Agricole des Etats Unis *et al. vs.* Sam. H. Milliken. Def't's orig'l ans. Filed Jan'y 15, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy. Bidwell.

Afterwards, to wit, on the 15th day of February, 1886, judgment was rendered by the court upon the demurrers aforesaid in said cause in the words and figures following, to wit:

30 *Judgment.*

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS
vs.
SAM. H. MILLIKEN
} No. 784.

15TH DAY OF FEBRUARY, 1886.

This day came the parties, by their attorneys, and then came on to be heard the defendant's demurrers to the plaintiffs' original and amended petition, filed, respectively, June 6th, 1885, and January 28th, 1886, and the argument of counsel thereon being heard, it is the opinion of the court that the law is for the defendent. It is therefore considered by the court that the said demurrer be, and the same is hereby, sustained, and the said plaintiffs now here refuse to amend or plead further, but elect to abide by their said pleadings. It is therefore considered by the court that the plaintiffs' action be, and the same is hereby, dismissed, and that the plaintiffs, Societe Fonciere et Agricole des Etats Unis and Edmond Moreau, take nothing by their said suit, and the defendant, Sam. H. Milliken, go hence without day, and that he recover of the said plaintiffs his costs in this behalf expended, for which he may have his execution.

To which rulings and judgment the said plaintiffs except.

And, upon their application, the court now here fixes the cost bond on writ of error to the Supreme Court of the United States at the sum of five hundred dollars.

Thereupon the plaintiffs, by *its* counsel, then and there excepted to the ruling and judgment of the court, and in open court gave notice that *it* would apply for writ of error to the Supreme Court of the United States; and, upon motion of Mr. Harcourt, of
31 counsel for plaintiffs, it was ordered by the court that plantiff-have leave to file bond in the sum of $500, conditioned as prescribed by law.

32 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court for the fifth circuit and northern district of Texas, at Dallas, greeting:

Because in the record and proceedings and also in the rendition of a judgment in a plea which is in said circuit court, before you, between Societe Fonciere et Agricole des Etats Unis and Sam. H. Milliken, a manifest error has happened, to the great damage of the said Societe Fonciere et Agricole des Etats Unis, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, this 19th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

(Signed) A. J. HOUSTON, *Clerk.*

33 Allowed by—

(Signed) A. P. McCORMICK,
U. S. District Judge for the Northern District of Texas.

(Endorsed:) No. 784. U. S. of America. Societe Fonciere et Agricole des Etats Unis *vs.* Sam. H. Milliken. 1. Writ of error. Filed Feb'y, 1886. A. J. Houston, clerk, by James D. Adams, deputy.

34 *Bond for Writ of Error.*

Supreme Court of the United States.

"SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS" *et al.*
vs.
SAM. H. MILLIKEN.

Bond.

Know all men by these presents that we, Societe Fonciere et Agricole des Etats Unis and Edmond Moreau, of the city of Paris, France, as principals, and —— —— and —— ——, of Parker county, State of Texas, as sureties, are held and firmly bound unto

Sam. H. Milliken, of the said county of Parker, the defendant above named, in the sum of five hundred dollars, to be paid to the said Sam. H. Milliken, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this — day of February, A. D. 1886.

Whereas the above-bounden Societe Fonciere et Agricole des Etats Unis and Edmond Moreau have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Texas, at Dallas:

Now, therefore, the condition of this obligation is such that if the said Societe Fonciere et Agricole des Etats Unis and Edmond Moreau shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SOCIETE FONCIERE ET AGRICOLE
DES ETATS UNIS, [SEAL.]
(Signed) By HARCOURT & BALL, *Att'ys.* [SEAL.]
EDMOND MOREAU, [SEAL.]
(Signed) By HARCOURT & BALL, *Att'ys.* [SEAL.]
(Signed) HENRY P. DU BELLET. [SEAL.]
(Signed) A. J. BALL. [SEAL.]

Signed and sealed in presence of—
(Signed) J. L. L. McCALL.
(Signed) G. A. McCALL.

Approved.
(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

STATE OF TEXAS, *Parker County:*

I, Thomas A. Wythe, clerk of the county court of said county of Parker, hereby certify that I am acquainted with A. J. Ball and Henry P. du Bellett, sureties on the foregoing and above-named bond and with their pecuniary condition and responsibility, and that I believe them to be sufficient sureties for the purposes of the above bond.

Witness Thomas A. Wythe, — of the county court of Parker county, in the State of Texas, and the seal of said court hereon impressed at office, in said county, on the 25th day of February, A. D. 1886.

[SEAL.] (Signed) THOS. A. WYTHE,
Cl'k Co. C't Parker Co., Texas.

(Endorsed:) No. 784. Bond. Supreme Court of the United States. Societe Fonciere et Agricole des Etats Unis *et al. vs.* Sam. H. Milliken. Filed Feb'y 27, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

36 *Citation in Error.*

UNITED STATES OF AMERICA, *ss:*

To Sam. H. Milliken, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court for the fifth circuit and northern district of Texas, at Dallas, wherein Societe Fonciere et Agricole des Etats Unis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. P. McCormick, one of the judges of the said circuit for the northern district of Texas, at Dallas, this — day of February, in the year of our Lord one thousand eight hundred and eighty-six.

(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

(Endorsed:) No. 784. U. S. of America. Societe Fonciere et Agricole des Etats Unis *vs.* Sam. H. Milliken. Citation to def't to appear. I acknowledge notice and accept service of the within writ of error this May 13th, 1886. (Signed) Watts & Ward, att'ys for def't, S. H. Milliken.

37 *Assignment of Error.*

Supreme Court of the United States. October Term, in the year of our Lord 1886.

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS *et al.*, Pl'ffs in Error,

vs.

SAM. H. MILLIKEN, Def't in Error.

Afterwards, to wit, on the second Monday of October, A. D. 1886, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said "Societe Fonciere et Agricole des Etats Unis" and Edmond Moreau, by Harcourt & Ball, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit: That the court erred in sustaining the demurrers interposed by the defendant, Sam. H. Milliken, and rendering judgment in favor of Sam. H. Milliken and dismissing the suit of the plaintiffs, Societe Fonciere et Agricole des Etats Unis and Edmond Moreau, at their cost, and they pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of said judgment, and that such

judgment be rendered here in said demurrers as will overrule the same and declare the law in favor of the plaintiffs.

(Signed) JOHN T. HARCOURT,
(Signed) A. J. BALL,
Att'ys for Pl'ffs in Error.

(Endorsed:) No. 784. Cir. court. Supreme Court of the
38 United States. Societe Fonciere et Agricole des Etats Unis *et al.*, pl'ffs in error, *vs.* Sam. H. Milliken, def't in error. Assignment of errors. Harcourt & Ball, attorneys for pl'ff- in error. Filed April 14, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

39 UNITED STATES OF AMERICA,
Northern District of Texas:

I, Andrew J. Houston, clerk of the circuit court of the United States for the northern district of Texas, at Dallas, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the cause of "Societe Fonciere et Agricole des Etats Unis," plaintiff, against Sam. H. Milliken, defendant, as the same appears of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of our said court, at my office, in the city of Dallas, on this 17th day of July, 1886, and of the Independence of the United States the 111th year.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk United States Circuit Court,
Northern District of Texas, at Dallas.

Endorsed on cover: N. Texas C. C. U. S. No. 556. Societe Fonciere et Agricole des Etats Unis, plaintiff in error, *vs.* Sam. H. Milliken. Filed December 11, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 556.

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS, Plaintiff in Error.

vs.

SAM H. MILLIKEN, Defendant in Error.

Brief for Plaintiff in Error.

JOHN T. HARCOURT,
OF COUNSEL.

Sun Publishing Company, Printers, Weatherford.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1888.

No. 556.

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS, Plaintiff in Error.

vs.

SAM H. MILLIKEN, Defendant in Error.

Brief for Plaintiff in Error.

JOHN T. HARCOURT,
OF COUNSEL.

STATEMENT OF THE CASE.

This was a direct proceeding to set aside a default judgment, rendered against plaintiff in error on the 8th day of June, 1883, for the sum of

$26.025, as principal and interest, and the further sum of $2,602.50 as attorney's fee, and the foreclosure of an attachment lien and order of sale, under which 37.054 acres of land in Parker and Palo Pinto counties, Texas, were sold at a grossly inadequate price. Also 235 city lots in the city of Weatherford, and 718 town lots in the town of Ednaville, in Palo Pinto county.

The plaintiff in error was a private foreign corporation, organized under the laws of the Republic of France, with its principal office or place of business in the city of Paris.

The suit in which said default judgment was rendered was filed on the 9th day of January, 1883, in the United States Circuit Court for the Northern District of Texas against the said "Societe Fonciere et Agricole des Etats Unis," alleging that the defendant is a foreign corporation and a citizen of the Republic of France, and that it has an office and place of business and a general agent acting for it in the city of Weatherford, in Parker county, Texas; that Henry P. du Bellet is the duly authorized general agent of the defendant at that place; that said foreign corporation is the owner in fee of large bodies and tracts of land in the counties of Parker and Palo Pinto, in the State of Texas.

A summons was issued to the United States Marshal, commanding him to summons the "Societe Fonciere et Agricole des Etats Unis," if to be found in his district.

The Marshal's return, "Received this writ on the 9th day of January, 1883, and executed the same on the 10th day of January, 1883, by delivering to the within named defendant's general agent. H. P. du Bellet, at Weatherford, Parker county, Texas, in person, a certified copy of the petition in this case, also a true copy of the writ."

The name of the agent was not given in the summons, and it did not direct the Marshal to execute by serving a copy of the summons on the named local agent in Parker county. There was no proof made before default taken that the person served was really the general agent of the corporation.

The affidavit for attachment was as follows:

"Before me, the undersigned authority, this day personally appeared Sam H. Milliken, who having been first sworn, says that he is the plaintiff in the above entitled cause; that the defendant, Societe Fonciere et Agricole des Etats Unis, is justly indebted to him in the sum of twenty-three thousand and eight hundred dollars, with interest, as stated in his petition; that of this sum twenty thousand and eight hundred dollars is now due, and that the sum of three thousand dollars will be due on the 5th day of February, 1883; that the defendant, Societe Fonciere et Agricole des Etats Unis, is not a resident of the State of Texas, *or* is a foreign corporation, *or* is acting as such; that the attachment is not sued out for the purpose of injuring or harassing the defendant; that the plaintiff will probably lose his debt unless such attachment issues." Trans., p. 12.

A bond for attachment was executed in the sum of $48,000.

The amount of the debt sworn to be due was $27,521.12, and the judgment was rendered for $28,627.50. Trans., p. 13.

Within two years from the date of the judgment this proceeding was instituted by plaintiff in error for a rehearing and to vacate and annull the default judgment, and the sales of land, etc.

The material facts set forth in the petition as jurisdictional causes for the nullity of said default judgment are, that Sam H. Milliken, the plaintiff, was a resident citizen of Texas, and the defendant, Societe Fonciere et Agricole des Etats Unis, was a foreign corporation, having its principal office or place of business in Paris, France. That it had no principal office or place of business in said State of Texas, but had an agent, Henry P. du Bellet, in Weatherford, Texas, with certain limited and restricted powers for making contracts, but he had no power or authority to waive or accept service of process, and was not designated as an agent upon whom service could be made. That said judgment was rendered by default, and there was no service of process, or acceptance, or waiver of process, or appearance, by the defendant

in said suit. That the said foreign corporation was not an incorporated company known to the laws of Texas, and within the meaning of Art. 1223, Rev. Stat. of Texas, so as to authorize service of citation upon a local agent, and the said suit was not brought in Parker county, as contemplated by said statute, nor was the service made on said agent in Dallas county, where the suit was brought. That the summons commanded the United States Marshal to summons the said corporation by name, if found in his district, and did not authorize or direct service to be made on the said Henry P. du Bellet. That the return shows that it was served on a person not named in the writ, without legal authority. That the record fails to show that the foreign corporation had established an agency in the state. That at the time of the execution of the notes sued on, the said Henry P. du Bellet, as agent, executed and delivered as a contemporaneous instrument two deeds of trust to secure the payment of said notes by the conveyance of 17,470 acres of land in Parker and Palo Pinto counties, and also valuable town and city lots in the city of Weatherlord and the town of Mineral Wells, which was ample security for all of said debts, and valued by the United States Marshal at $27,395 53. That at the time of filing the suit on said notes the defendant, Sam H. Milliken, filed an affidavit in writing that plaintiff in error was not a resident of the State of Texas, *or* is a foreign corporation, *or* is acting as such, and thereupon obtained the said writ of attachment which was levied on the said lands and town lots embraced in the said two deeds of trust.

It is alleged that the said attachment was null and void because the affidavit for attachment alleged in the disjunctive; the existence of one or the other of two or three distinct causes for the attachment, and because the attachment bond was not in a sum not less than double the debt sworn to be due, and because there was no valid levy of the attachment, and there was no judgment of foreclosure of the attachment lien.

That said judgment was illegal and void because the said corporation

was in the hands of a receiver, known under the laws of France as a liquidator, who was the public agent and trustee of said corporation, and could not delegate any authority to the agent in Texas to represent said corporation at the time of the filing of said suit and the pretended service of said process and at the date of said judgment, and of this the said Sam H. Milliken had full notice; that said corporation and said liquidator did not have legal notice of said suit, and had no opportunity of filing their defense. That they have a good defense to said action in this: That the said Sam H. Milliken was the president of the First National Bank at Weatherford; took advantage of the embarrassment of said corporation and its agent, and exacted and demanded extravagant, usurious interest, which was included and embraced in said promissory notes and on open account, and the usury amounted at the date of judgment to the sum of $1,179.08. That in addition to said usurious contract the stipulation in said promissory notes for the payment of ten per cent. as attorney's fee, if collected by law, was an artful device to cover illegal interest, and that amount was received and collected by the said Milliken, and was not paid to any attorney as a fee for collecting said notes. That by reason of said errors, wrongs and irregularities the said corporation has been damaged in the sum of $80,000, which is the reasonable value of said property at the time it was purchased by said Milliken. That said plaintiff did not ascertain or discover the real facts and the illegality of said proceedings, and the nature of the defense to said suits, until within the last three months; that the said corporation is ready and willing to pay to said defendant, Sam H. Milliken, the full amount of all that is legally due on said promissory notes, and will submit to any judgment or decree that may be rendered herein.

Wherefore, petitioners pray that defendant may be cited, and that upon a rehearing and review of said cause, said judgment may be set aside and all the proceedings thereunder vacated, annulled and cancelled; and that such judgment may be re-formed and rendered for the

principal sum of the money due on said notes, excluding the whole rate of interest as prescribed by law in such cases, and for general relief. Tran., p. 9.

DEFENDANT'S PLEA.

On the 15th day of January, 1886, the defendant, Sam H. Milliken, filed his general and special demurrer to plaintiffs' petition, and says that it is shown in said plaintiffs' petition that the matters and things therein set out and complained of and the relief sought are cognizable alone by a court of equity, and this court, or a court of law, has no jurisdiction to hear and determine the same, nor to grant the relief prayed for.

Further specially demurring to said petition, defendant says:

First. The plaintiffs are seeking to review a judgment at law after the adjournment of the term of court at which said judgment was rendered by a proceeding in said court, which is a court of law and not a court of equity.

Second. Plaintiffs' petition shows that it is brought by defendant's company and one Edmond Moreau, who it is shown was not a party to the suit sought to be reversed, and is not a party; and, further, that he is a foreign assignee claiming the property in controversy, as against a home attaching creditor.

Third. Plaintiffs do not show that they have or had any defense to the claim sued on by defendant and in which the judgment complained of was rendered, but admit the justness of said claim, and they do not show why they or the plaintiff company did not appear and answer in said suit.

Fourth. They seek to set aside a judgment which they say is null and void, which, if true, cannot and does not in any way effect their rights. Upon all of which the defendant prays the judgment of the court. [Signed] B. G. BIDWELL, Attorney for Defendant.

And afterwards, to-wit, on the 15th day of February, 1886, judgment

was rendered by the court upon the demurrers aforesaid, that the said demurrer be and the same is hereby sustained; that the plaintiffs' action be and the same is hereby dismissed, and that the plaintiffs take nothing by their said suit, and the defendant, Sam H. Milliken, go hence without day and recover his costs, etc. Tran. p. 16.

To which judgment the said plaintiffs except and prosecute this writ of error.

They assign as error the ruling and judgment of the court in sustaining the demurrer and dismissing the plaintiffs' suit. Trans., p. 19.

POINTS.

FIRST.—In considering whether the petition for review presents a good cause of action the demurrer admits all the allegations to be true. This admission shows that the plaintiffs' company was organized under the laws of the Republic of France, with its principal place of business in the city of Paris. That it went into the hands of a receiver on the day of November, 1882, by order of the French court in Paris having jurisdiction of the same, which gave to the receiver full power and authority to take and hold possession of all the property and effects of said corporation, and to manage and control the same.

That pending the process of liquidation in Paris, Sam H. Milliken on the 9th day of January, 1883, filed his suit against this foreign corporation, with full notice that it was in the hands of a receiver, and that Henry P. du Bellet could not be the agent of an agent upon whom process could be served.

It is admitted that said corporation had no principal office or place of business in the State of Texas; that Henry P. du Bellet was an agent in Weatherford, with limited and restricted powers for making contracts, but had no power or authority to waive or accept service of process, and was not designated as an agent upon whom service could be made.

That said Milliken by his management prevented fair competition

and discouraged and prevented other bidders so that he could obtain the purchase of all of said property, and did purchase it at a grossly inadequate price.

A judicial sale will be set aside for gross inadequacy of price, accompanied by fraud, or other unfairness in the conduct of the sale.

Davis vs. McGee, 28 Fed. Rep., 867.

Hunt vs. Fisher, 29 Fed. Rep., 801.

That said judgment for $28,672.50 was rendered on the 8th day of June, 1883, by default, and there was no service of process, or acceptance or waiver of process, or appearance by the defendant in said suit and that there was usurious interest in the notes. Trans., pp. 1 to 12.

Under an Act of Congress prescribing the rate of interest that National banks may charge, and giving penalties against them for taking, receiving or charging interest greater than the law permits, a forfeiture of the entire interest on the note is prescribed, and twice the amount of the interest may be recovered back.

Sec. 5198, Rev. Stat. U. S.

On demurrer the court will take judicial notice of the laws of Texas. Art. 1373, Rev. Stat. of Texas: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant, for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment."

In construing this statute the Supreme Court of Texas says: "A strict literal construction of the statute would limit the remedy to cases or suits governed by the principles of equity, and would deprive by far the greater number of defendants, brought into court by publication of notice, of the benefit of its provisions. We therefore believe that the term used in the statute should be construed in the more enlarged sense of a rehearing or new trial."

Mussina vs. Moore, 13 Tex., 7.

"When a plain, adequate and complete remedy may be had at law, a suit in equity will not be sustained."

Sec. 723, Rev. Stat. of U. S.

Wright vs. Ellison, 1 Wall, 16.

Art. 1223, Rev. Stat., provides: "In suits against any incorporation or joint stock association the citation may be served on the president, secretary, or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought, or by serving a copy of the same at the principal office of the company during office hours."

There was no authority for service on a foreign corporation until the passage of the Act of March 31, 1885. Art. 1223 a, Rev. Stat., provides: "In any suit against a foreign, private or public corporation, joint stock company or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent, within this State, of such corporation, joint stock company or association, or acting corporation or association."

By Art. 1235, Rev. Stat., provision was made for citation for non-resident defendants by publication.

SECOND.—The attachment proceeding cannot avail to support the jurisdiction or the judgment. The attachment was based on the second clause of Art. 152, Rev. Stat. of Texas, on the ground "That the defendant is not a resident of the State, *or* is a foreign corporation, *or* is acting as such." The affidavit on this ground was repugnant to the pretended personal service on the agent, H. P. du Bellet.

"The property of the non-resident is only attachable when his residence is not such as to subject him personally to the jurisdiction of the court, and place him upon equality with other residents in this respect. The use of this writ when the defendant is within reach of ordinary process is wholly inconsistent with the spirit and design of the statute." Waples on Attachment, 35–36, and cases cited.

Sec. 915, Rev. Stat. of the United States, the Federal courts adopt the State laws in relation to attachments. It has been held "that an attachment cannot be issued for the purpose of acquiring jurisdiction over a person who is a non-resident of the district, or who is not found there and upon whom no process in *personam* has been served."

Chittenden vs. Darden, 2 Woods, 437.

Spear on Fed. Pro., 661.

The attachment was invalid because the affidavit was in the disjunctive.

In Hopkins vs. Nichols, 22 Tex. Rep., 206, the court says: "An attachment will be quashed if issued upon an affidavit alleging in the disjunctive the existence of one or the other of two distinct causes for the attachment." Tran., p. 12.

The attachment was invalid because the attachment bond was not "in a sum not less than double the debt sworn to be due." Trans., pp. 10–12. Art. 156, Rev. Stat. of Texas, provides: "Before the issuance of any writ of attachment the plaintiff must execute a bond, with two or more sureties, payable to the defendant in a sum not less than double the debt sworn to be due, conditioned," etc.

The creditor must observe all the statutory conditions imposed when he resorts to this extraordinary mode of relief. The attachment bond is jurisdictional. Waples on Attach., 24.

Art. 1245, Rev. Stat. of Texas, provides: "No judgment shall in any case be rendered against any defendant unless upon service or acceptance, or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except when otherwise expressly provided by law."

The Supreme Court of Texas has said: "Where there is no legal service or appearance the judgment is void."

Witt vs. Kaufman, 25 Tex. Sup., 384.

Galpin vs. Page, 18 Wall, 364.

Pennoyer vs. Neff, 5 Otto, 714.

THIRD.—The corporate entity cannot travel from one State to another, but it can authorize an agent to represent it beyond its home. This appointment must be by a corporate act. No other power can appoint such agent.

St. Clair vs. Cox, 16 Otto, 350.

The exception to the general rule that a valid judgment in *personam* cannot constitutionally be rendered against a non-resident defendant who was not personally served with process without the State, nor voluntarily appeared, is this, that when an agent is appointed by the defendant for the purpose of receiving service of process for the defendant, as a condition upon which the consent of the State was given for it to do business in the State, then personal service of process upon such agent would authorize a valid judgment in *personam* against the defendant.

When the State has imposed no such conditions, and no such agent has been appointed, the exception to the rule cannot apply.

In the case of United States vs. American Bell Tel. Co., Judge Jackson says: "Without undertaking to review the authorities on the subject of a corporation's liability to suit in a State or district other than that of its creation, we think the decisions of the Supreme Court have settled and established the proposition that in the absence of a voluntary appearance three conditions must concur or co-exist in order to give the Federal courts jurisdiction in *personam* over a corporation created without the territorial limits of the State in which the court is held, viz: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and, (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit therein as a condition, express or implied, of doing business in the State."

He further held that an agent of a foreign corporation, upon whom

service can be made, must be one actually appointed by or representing the corporation as a matter of fact, not one created by implication or construction, contrary to the intention of the parties.

29 Fed. Rep., 17–34, 35.

Lafayette Ins. Co. vs. French, 18 How., 404.

The Supreme Court of Texas, in Stewart vs. Anderson, 70 Tex. Rep., 588, says: "Before the property of a non-resident could be seized and sold under attachment it was necessary that the attachment should have been levied on property within this State, and that the service required by law to be given by publication should have been given before the court could acquire jurisdiction to enter a judgment directing the property seized to be sold for the payment of a debt; that unless this notice is legally given no court has power or jurisdiction to order a sale of the defendant's property though, *in custodia legis*, by virtue of its seizure under a valid attachment."

LAST.—For these reasons it is respectfully submitted, that upon the merits of the case, as raised on demurrer, the judgment below should be reversed.

JOHN T. HARCOURT,
Of Counsel.

S. H. MCKEEN,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1869.

No. 274.

SOCIETE FONCIERE ET AGRICOLE DES ETATES UNIS,

Plaintiff in Error.

vs.

SAM H. MILLIKEN,

Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

A. S. LATHROP,

Attorney for the Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

SOCIETE FONCIERE ET AGRICOLE DES ETATS UNIS,
Plaintiff in Error.
vs.
SAM H. MILLIKEN,
Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Northern District of Texas, at Dallas.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

If any brief has been filed by the plaintiff in error, I have had no opportunity to examine the same, and therefore present the following statement of the case:

On the 9th day of January, 1883, the defendant in error, Sam H. Milliken, as plaintiff, brought suit in the United States Circuit court, at Dallas, Texas, against the plaintiff in error on three promissory notes, executed

by the plaintiff in error and payable to said Milliken, for the sum of $23,800, all due when suit was begun, except the sum of $3,000, which became due in February, 1883. Attachment issued and was levied on the lands of the defendant Co., plaintiff in error.

In this suit plaintiff alleged that the defendant was a non-resident, a French corporation owning lands in Parker and Palo Pinto counties, Texas. That said company had an office and place of business, and a general agent acting for it in the city of Weatherford, in Parker county, Texas. That Henry P. du Bellet was the duly authorized general agent of the defendant in said place. The notes sued on are set out in the record.

On the 19th day of May, 1883, said Milliken filed another suit in the United States Circuit court for the Northern District of Texas, against plaintiff in error on a promissory note for the sum of $2,819.99, alleging that the defendant corporation was a foreign corporation, and that said du Bellett was its general agent in Texas. In this suit there was no attachment prayed for. In the first suit the ground for attachment was that "the defendant Society & Co. is not a resident of the state of Texas, or is a foreign corporation, or is acting as such." Citation was duly served on said du Bellett and attachment levied on lands of said company in Parker and Palo Pinto counties, Texas.

On the 8th day of June, 1883, judgment by default was taken against said company with a foreclosure of the attachment liens. The lands were sold under said judgment, part of them in September, 1883, the remainder in April, 1884.

On June 6th 1885 the Plaintiff in error, the Societe Fonciere et Agricole Des Etats Unis, filed in the United States Circuit Court at Dallas, Texas, a petition at law, for a rehearing and to set aside said judgment by default, rendered in favor of Sam H. Milliken and against said Societe Fonciere, etc., June 8th 1883. It was claimed in said petition that said Societe Fonciere, etc. was a foreign corporation, incorporated for the following objects and purposes, viz:

"This society has for its object all real estate, agricultural and commercial operations of every nature whatsoever regarding the purchase, acquisition in the way of grants or otherwise, and the improvement as owner or othewise of lands in the State of Texas, etc. etc." It was also therein alleged "that said corporation had no principal office or place of business in the State of Texas, but it had an agent, Henry P. du Bellet, in Weatherford, Parker county, with certain limited and restricted powers for making contracts, but he had no power or authority to waive or accept service of process and was not designated

as an agent upon whom service could be made." R 5.

It was therein claimed in effect that their was no survice of process in said suit upon said Societe Fonciere, etc., and therefore the judgment was void, R 5.

Sam H. Milliken, on January 15th, 1886, answered by general and special demurrer, general denial, etc. R 14, 16.

February 15th 1886, the case came on for trial, and the Court sustained the demurrer to said petition, and the plaintiffs then having refused to amend or plead further the said suit was dismissed. R 16.

The only assignment of error is, that the Court erred in sustaining the demurrer interposed by said Sam H. Milliken, and in dismissing the suit. R 19.

ARGUMENT.

I.

The statutes of Texas authorizes attachments on various grounds. Among others, "that the defendant is not a resident of the state, or is a foreign corporation, or is acting as such." It also provides that "the writ of attachment above provided for may issue although the plaintiff's debt in demand be not due." See articles 152 and 155 of the revised statutes of Texas.

The affidavit states but one ground of attachment

and is not inconsistent. Revised statutes of Texas, article 152.

Dunnenbourn vs. Scram, 59 Texas. 281.

Carpenter vs. Pridgen, 40 Texas, 32.

Blum vs. Davis. 56 Texas, 423.

That attachment found for less than the amount of the debt sued for is not error.

Dwyer vs. Testard, 65 Texas, 432.

II.

The Statute of Texas in force January 9th and 10th, 1883, provided: "In suits against any corporated company or joint stock association, the citation may be served on the president, secretary or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought by leaving a copy of the same at the principal office of the company during office hours. Revised statutes of Texas, article 1223.

Service of the citation upon du Bellet as agent of the corporation, as shown by the allegations of the petition of plaintiff in error, is sufficient and in substantial compliance with the statute. It appears from the petition that the corporation owned lands in Texas; that its business was conducted by Henry P. du Bellet as its agent at Weatherford, Parker County, Texas, that he as

such agent, executed the notes upon which Millken brought suit, and that said du Bellet was the only agent it had in Texas. R 2, 7.

St. Clair vs. Cox, 106 United States, 350

2nd. Wood, 479.

22nd Federal reporter, 305.

The case in 22nd Federal Reporter 305, is by Judge Sabin of the eastern district of Texas, and is directly in point. The case involved a construction of article 1223 of the Texas statutes quoted above, and it is there held that service of process upon the only agent in the State transacting business for a foreign corporation, is valid service upon the corporation.

III.

The judgment will not be set aside, where there is *no* service if there is no defence to the claim.

24 N. W. Repr. 274.

Schleicher vs. Markward, 61 Texas 99.

39 Federal Repr. 680.

Lewis vs. Cock, 23 Wall 466.

IV.

Rights of foreign receiver.

2 N. E. Repr. 440.

Whorton's conflict of laws. Sections 353, 368, 391, 735, 6.

Story's conflict of laws. Sections 403, 410, 412 et seq'l.

V.

Article 1373, revised statutes of Texas provides: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection, a new trial may be granted by the Court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment."

This is the only provision of the Texas statute which provides for a new trial after the adjournment of the term at which the judgment is rendered.

In Overton vs. Blum, 50 Texas 423, the Supreme Court of Texas, says "it must now be regarded as settled, that a new trial is never in fact, granted after the adjournment of the term of the court at which the judgment is rendered, no matter what are the grounds urged in support of the application." It then held, that in equity, relief may be had by examining the case on its merits. See also Bronson vs. Schulter 14, Otto 410.

Philips vs. Argley, 117 U. S.

VI.

Article 2268 revised statutes of Texas provides: "After the expiration of twenty days from the rendition

of a final judgment in the district or county court, and after the overruling of any motion therein for a new trial or in arrest of judgment, if no superredras bond on appeal or writ of error has been filed and approved, the clerk shall issue execution upon such judgment upon the application of the successful party."

The judgment was rendered June 8th, 1883. R 13. The order of sale issued June 29th, 1883 R 5.

VII.

If this were a bill of review in equity it would not be sustained at the suit of a foreign receiver.

Thompson vs. Maxwell & Co., 5 Otto 391.

All of which is respectfully submitted.

A. S. LATHROP,

Attorney for Defendant in Error.